

September 24, 2002

Ms. Donna Caton
Chief Clerk
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701

Re: Commonwealth Edison Company
Docket No. 02-0479

Dear Ms. Caton:

The Brief on behalf of the Abbott Laboratories et al as the Illinois Industrial Energy Consumers has filed electronically with the Clerk of the Illinois Commerce Commission this date. Copies of the foregoing have been provided to parties on the service list.

Your cooperation and assistance in filing same is appreciated.

The Administrative Law Judges are being provided a hard copy by overnight mail.

Sincerely,

Eric Robertson

ECF/alb
Enclosure/38436

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition for declaration of service currently	:	
provided under Rate 6L to 3 MW and greater	:	No. 02-0479
customers as a competitive service pursuant to	:	
Section 16-113 of the Public Utilities Act and	:	
approval of related tariff amendments.	:	

BRIEF OF THE ILLINOIS INDUSTRIAL ENERGY CONSUMERS
PUBLIC VERSION

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September 24, 2002

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INTRODUCTION

IIEC companies in this proceeding endorse and support a competitive electricity market. They strenuously disagree that such a market exists in the Commonwealth Edison Company (“ComEd”) service territory and that the requirements of Section 16-113 (220 ILCS 5/16-113) of the Public Utilities Act (The “Act”) for declaring a tariff service or the provision of power and energy competitive, have been met for 3 MW and over customers in the ComEd service territory. In the absence of a truly competitive retail market, and the ability to meet the standards established under Section 16-113, the ComEd Petition to declare Rate 6L competitive for 3 MW and over customers should be rejected. Allowing the Petition to take affect by operation of law imposes unnecessary and undue risk upon customers. If the Illinois Commerce Commission (“Commission”) has any doubt about the ComEd , the appropriate action is to deny the Petition and allow ComEd to refile in its Petition with six months.

In support of these positions, IIEC companies in this proceeding presented the testimony and exhibits of six witnesses. They presented the testimony of Mr. Maurice Brubaker, principal in the firm of Brubaker & Associates, Inc. (IIEC Ex. 1.0 and 1.0P); Mr. Alan Chalfant, principal in the firm of Brubaker & Associates, Inc. (IIEC Ex. 2.0 - 2.3); Mr. James R. Dauphinais of the firm Brubaker & Associates, Inc. (IIEC Ex. 3.0 - 3.6 and 3.0P - 3.6P); Mr. Robert R. Stephens of the firm Brubaker & Associates, Inc. (IIEC Ex.4.0 - 4.2); Mr. Mark Kelly of Caterpillar Inc. (IIEC Ex. 5.0); and Mr. Gordon Hauk of Ford Motor Company (IIEC Ex. 6.0).

The testimony of these witnesses demonstrates the following:

1. ComEd's use of switching statistics to demonstrate the existence of services that are reasonably available, reasonably equivalent, and comparable in price to Rate 6L in its service territory is not a reliable indicator of the existence of such services.
2. The destination market in the ComEd service territory is too highly concentrated to be characterized as competitive for the purpose of demonstrating compliance with Section 16-113 of the Act.
3. There are only a handful of non-affiliated Retail Electric Suppliers ("RES") serving three MW and over customers in the ComEd service territory. Because of uncertainties associated with 1) a recent Appellate Court Decision interpreting the reciprocity clause (220 ILCS 5/16-115(d)(5)), 2) the financial status of Retail Electric Suppliers (RES), 3) the status of regional transmission organizations (RTO) in Illinois, and 4) the Federal Energy Regulatory Commission's (FERC) Standard Market Design (SMD) rulemaking there is serious question as to the number of non-affiliated RESs that will be able to serve in the ComEd market in the future.
4. In the absence of artificial support of ComEd and its affiliated generating company, Exelon Generating Company (ExGen), there would be little or no retail competition in the ComEd service territory. (As noted by Staff witness Dr. Howard Haas, ComEd's affiliate had to step in twice to prop up the market in Illinois, and all five of the RESs serving 3MW and over customers required and benefitted financially from that support. (Staff Ex. 3.00 at 7).)
5. ComEd has not demonstrated that service reasonably equivalent to Rate 6L is reasonably available at a comparable price to 3 MW and over customers in its service territory.

6. There is an absence of risk management tools at the retail level that prevents retail customers from managing risk associated with the volatility in CTCs and the extreme volatility in electricity prices.

7. Customers are likely to return to Rate 6L in the face of ComEd's proposal to declare Rate 6L competitive, rather than enter RES supply market or remain in the RES supply market.

8. Given the appropriate tools for risk management and the resolution of the inherent problems caused by the presence of the CTC, IIEC companies in this proceeding have demonstrated they are willing to be active participants in truly competitive retail electric markets and to assume their fair share of risk. However, they are not prepared to do so in markets subject to market power abuse and absent resolution of the CTC problems and absent such tools. Furthermore, they are certainly not prepared to assume all of the responsibility for the wholesale price and supply volatility which ComEd proposes to shift from its generating affiliate (not itself) to its end use customers.

9. Customers are further harmed under the ComEd proposal in several respects. First, customers under existing contracts with terms that expire after May 2003 are prohibited from returning to Rate 6L. In addition, they would be further harmed if ComEd's Rate HEP were adopted as the default rate.

10. Given the uncertainties described above, and the substantial uncertainties associated with the FERC SMD and the uncertainties associated with RTO development within the State of Illinois in particular and in the Midwest in general, this is the worst time to grant the ComEd Petition or to allow it to take effect as a matter of law.

IIEC notes the ComEd Petition has not been supported by any customer or customer group in this

proceeding despite the prospective benefits of the Petition alleged by ComEd. Even suppliers participating in the case have recommended the Petition be rejected at this time or only be allowed to take effect as a matter of law, so the issue can be revisited later. Finally, the Commission Staff has presented testimony recommending the Petition be denied.

In considering the issue in this case and applying the provisions of Section 16-113, the Commission needs to consider whether a fully competitive market must exist for a reasonably equivalent service to be reasonably available at a comparable price with sufficient transmission capacity to grant access to such service. It must also determine if its market concentrations are so high it cannot be said that such a service is reasonably available at a comparable price.

I. Overview of Statutory Standards and Objectives

A. Section 16-113

This section provides in pertinent part:

“An electric utility may, by petition, request the Commission to declare a tariffed service provided by the electric utility to be a competitive service. The electric utility shall give notice of its petition to the public in the same manner that public notice is provided for proposed general increases in rates for tariffed services, in accordance with rules and regulations prescribed by the Commission. The Commission shall hold a hearing on the petition if a hearing is deemed necessary by the Commission. The Commission shall declare the service to be a competitive service for some identifiable customer segment or group of customers, or some clearly defined geographical area within the electric utility's service area, if the service or a reasonably equivalent substitute service is reasonably available to the customer segment or group or in the defined geographical area at a comparable price from one or more providers other than the electric utility or an affiliate of the electric utility, and the electric utility has lost or there is a reasonable likelihood that the electric utility will lose business for the service to the other provider or providers; . . . In determining whether to grant or deny a petition to declare the provision of electric power and energy competitive, the Commission shall consider, in applying the above criteria, whether there is adequate transmission capacity into the service area of the petitioning electric utility to make electric power and energy reasonably available to the

customer segment or group or in the defined geographical area from one or more providers other than the electric utility or an affiliate of the electric utility, in accordance with this subsection. The Commission shall make its determination and issue its final order declaring or refusing to declare the service to be a competitive service within 120 days following the date that the petition is filed, or otherwise the petition shall be deemed to be granted; provided, that if the petition is deemed to be granted by operation of law, the Commission shall not thereby be precluded from finding and ordering, in a subsequent proceeding initiated by the Commission, and after notice and hearing, that the service is not competitive based on the criteria set forth in this subsection.”

It is undisputed that this section of the Act establishes the standard or standards for declaring a tariffed service or power and energy competitive. What has not been clear is exactly what it is that ComEd is attempting to declare competitive, Rate 6L or power and energy provided to 3 MW and over customers in its service territory.¹ However, Section 16-113 does provide that if the service ComEd seeks to declare competitive or a reasonably equivalent service is reasonably available, at a comparable price, to the group of customers affected by the Petition, then the Commission shall declare the service competitive.

Further, because ComEd claims in its Petition that its request involves a declaration of power and energy as competitive, the Commission must consider whether there is sufficient transmission capacity into the ComEd service territory to make the service or a reasonably equivalent service reasonably available at a comparable price to 3 MW and over customers.

Therefore, the Commission must determine whether the service available to 3 MW and over

¹IIEC will not repeat the arguments made with Joint Movants in reference to the lack of specificity in the ComEd Petition so as to permit customers to determine whether it is Rate 6L retail service in its entirety or power and energy which ComEd seeks to declare competitive. IIEC incorporates those arguments by reference. For the purpose of this brief, IIEC assumes it is Rate 6L which ComEd seeks to have declared competitive.

customers is reasonably equivalent to Rate 6L service, reasonably available to 3MW and over customers and available at a reasonably comparable price. Because the legislature does not define these terms, and because the Commission is dealing with a case of first impression, it should carefully evaluate the circumstances under which such services will be deemed to exist.

In addressing these issues the Commission should consider that when Section 16-113 was adopted, it was intended in IIEC's opinion, to provide the utilities with the ability to respond to the loss of electric load to competitors in a relatively rapid manner.² It was never intended to be used, as ComEd explicitly or implicitly suggests, to "jump start" competition in any utility service territory as suggested ComEd witness Ms. Arlene Juracek. (ComEd Ex. 10 at 13). ComEd's proposal puts the cart before the horse, declaring a service competitive before competition exists. If it were otherwise, there would be no need for the "jump start" ComEd proposes. This awkward situation is a function of the fact that ComEd cannot compete with RESs for the 3 MW and over load and, therefore, does not need to declare Rate 6L competitive under Section 16-113. This is because ComEd chose to meet the Commission's functional separation rules by becoming an Independent Distribution Company (IDC). (83 Ill. Adm. Code Part 452). Hence, it cannot offer competitive services reasonably equivalent to Rate 6L services to 3 MW and over customers. ComEd is actually "abandoning" a service for a particular customer segment, but has been unwilling to request the right to abandon the service under Section 8-508 of the Act discussed below. (220 ILCS 5/8-508).

B. Other Sections of the Act

²See also Section 16-111(f) of the Act which allows electric utilities to reduce rates to customer classes on seven days notice to the Commission. (220 ILCS 5/16-111(f))

There are other sections of the Act to consider in evaluating and deciding upon the ComEd Petition.

1. Section 16-103

This Section of the Act provides in pertinent part:

(a) An electric utility shall continue offering to retail customers each tariffed service that it offered as a distinct and identifiable service on the effective date of this amendatory Act of 1997 until the service is (i) declared competitive pursuant to Section 16-113, or (ii) abandoned pursuant to Section 8-508.

(b) An electric utility shall also offer, as tariffed services, delivery services in accordance with this Article, the power purchase options described in Section 16-110 and real-time pricing as provided in Section 16-107.

(e) The Commission shall not require an electric utility to offer any tariffed service other than the services required by this Section, and shall not require an electric utility to offer any competitive service.

(220 ILCS 5/16-103)

Section 16-103 requires electric utilities to continue to offer each tariff service they offered as a distinct and identifiable service on the effective date of the Customer Choice Law of 1997, until such services are declared competitive under Section 16-113 (220 ILCS 5/16-113) or abandoned under Section 8-508 (220 ILCS 5/8-508) of the Act. (220 ILCS 5/16-103(a)). Section 16-103 also provides the electric utility is to offer as a tariff service, delivery service, power purchase option service and retail time pricing service. (220 ILCS 5/16-103(b)). Finally, Section 16-103 provides that the Commission shall not require the electric utility to offer a competitive service or to offer a tariffed service other than the tariffed services required by the Section. (220 ILCS 16-103(e)).

Because Section 16-103 purports to limit the obligation of electric utilities such as ComEd to

provide tariff services and competitive services, the entry of an order approving ComEd's Petition to declare Rate 6L competitive could have profound and maybe irreversible effects on the nature of electric service in the ComEd service territory. It is, therefore, necessary that ComEd be required to identify, with sufficient clarity, exactly what service it seeks to have declared competitive.

Identification of the service ComEd seeks to have declared competitive is important for at least two reasons. First, customers and other interested parties, in order to have a fair opportunity to respond to the ComEd Petition require identification of the service to be declared competitive. This issue has been addressed at length in the context of the joint motions filed by intervenors in this proceeding.

Second, if the Commission is somehow prohibited from requiring an electric utility to offer a tariff service, which has been declared competitive, it is important for the Commission, the customers and the utility to know exactly the identity of the service being declared competitive, given the language of Section 16-103. ComEd's Petition and its evidence is deficient in that there is no clear indication of the identity of the service which ComEd seeks to declare competitive. Therefore, its Petition should be denied.

2. Section 8-508

This section governs the abandonment, discontinuation or modification of service by a public utility.

This Section provides in pertinent part:

“ . . . no public utility shall abandon or discontinue any service or, in the case of an electric utility, make any modification as herein defined, without first having secured the approval of the Commission,....

* * *

In granting its approval, the Commission may impose such terms, conditions or requirements as in its judgment are necessary to protect the public interest. Provided, however, that any public utility abandoning or

discontinuing service in pursuance of authority granted by the Commission shall be deemed to have waived any and all objections to the terms, conditions or requirements imposed by the Commission in that regard.”

Under this Section the utility must seek the approval of the Commission to abandon or discontinue any service and the Commission is allowed to impose terms and conditions on the abandonment in order to protect the public interest. Further, a utility abandoning or discontinuing the service pursuant to authority granted under Section 8-508 is deemed to have waived any objection to any term or condition imposed by the Commission.

ComEd witness Arlene Juracek testified that ComEd had considered the use of Section 8-508 to abandon Rate 6L service for 3 MW and over customers. (Juracek Tr. 847). While Ms. Juracek could not remember whether this approach was rejected by ComEd because of the Commission’s ability to impose conditions, a simple reading of the statute clearly suggests that the ability of the Commission to impose conditions on abandonment, necessary to protect the public interest, had to be a consideration in ComEd rejection of the use of Section 8-508. ComEd’s Petition is, in effect, a request to abandon Rate 6L service - - not declare it or some other service competitive. ComEd seeks to abandon said service as part of its overall provider of last resort initiative. The ComEd Petition is simply one of the incremental steps in relieving ComEd of the obligation to be provider of last resort. (Juracek Tr.846).

It is also clear that ComEd wishes to relieve its generating affiliate, ExGen, of the obligation to serve portions of ComEd’s load, assumed under the terms and conditions of the Power Purchase Agreement by and between ComEd and ExGen. (Juracek Tr. 846).

Under the terms of that agreement ComEd and its customers are protected, at least through December 31, 2004 from supply and price risk. (Juracek Tr. 860-862). In fact ComEd witness Juracek

described the arrangement as one which provided ComEd and its customers with a “hedge” against such risks. (Juracek Tr. 859). Now ComEd, through the artifice of declaring Rate 6L competitive under Section 16-113, seeks to deprive its largest customers of that benefit and eventually to deprive smaller commercial and industrial customers of the benefit as well. It does so by attempting to have this Commission declare the service competitive before a fully mature and competitive market exists, in order to “jump start” the competitive market. (*See* ComEd Ex. 10 at 13). However, what ComEd is clearly attempting to do is to abandon a service in order to avoid provider of last resort responsibility with out regard to whether the service in question is truly competitive.

II. Evidence Relating to Section 16-113

A. Identifiable Customer Segment

IIEC has taken no position with regard to this issue, but reserves the right to respond to the arguments of other on this issue.

B. Reasonably Equivalent Substitute Service that is Reasonably Available

It is ComEd’s position in this proceeding that evidence of customer switching is evidence of the existence of the reasonably equivalent service reasonably available at a comparable price. (*See* ComEd Ex. 7 at 4-5, 11, and 20). ComEd has presented no direct evidence of the existence of a service reasonably equivalent to Rate 6L, which is reasonably available to customers at a comparable price. It relies principally on inferences drawn from artificially inflated switching statistics. (*See* ComEd Ex. 7 at 4-5, 11, and 14; Crumrine/Kelter Tr. 622-623).

1. Differences Between RES Service and Rate 6L Service

Alternative power supply is not an equivalent substitute service to Rate 6L because of the many

differences between retail electric supplier (RES) power supply arrangements and such service. Also, the availability of alternative supply service varies widely among customers. The process of acquiring such a service from a RES is generally much more complex and time consuming than obtaining service under Rate 6L, therefore, alternative services are less available than Rate 6L service and come with significant transaction costs.

IIEC witness Mr. Stephens is familiar with arrangements between customers and RESs that indicate the general nature of the service and the prices, terms and conditions of that service. Based on that familiarity he compared Rate 6L service to services available from RESs. (IIEC Ex. 4.0 at 6).

He described the elements of the Rate 6L. He noted that Rate 6L is a bundled utility service rate available to customers with demands of 1 MW or greater as a large general service rate. He observed that Rate 6L customers must sign a 24 month contract with an automatic 12 month renewal, and the contract can be terminated on 30 days written notice. He identified that the three basic charges in Rate 6L are the monthly customer charge, demand charge and energy charge. He noted said charges are fixed. There is no minimum or maximum level of energy that must be purchased or consumed under Rate 6L and no minimum or maximum level of demand that must be purchased or consumed under the Rate. It does not require customers to notify ComEd of material variations and usage patterns. There is a ceiling on the average price per kWh to be paid per kWh in any given month. It allows for proration of demand charges in cases where customers have an abrupt decrease in load. Rate 6L can be taken in conjunction with other services such as interruptible service. Finally, under Rate 6L the customer takes title to the electric power and energy at its premises. (IIEC Ex. 4.0 at 6-7).

Unlike Rate 6L, RES offerings usually include provisions for maximum and/or minimum usage levels

which can apply on a monthly basis or annually. Often the RES contracts, unlike Rate 6L, require the customer to give notice of material variations in expected usage over time or in the alternative assess energy and balance charges to the customer. Unlike Rate 6L, the delivery point for RES contracts is often at some point on the transmission delivery system, as opposed to the customer's premises. Unlike Rate 6L, RES contracts generally contain provisions for force majeure and provisions for events of default. In addition, concerns about counter party risks differentiate RES service from Rate 6L service and make RES contracts riskier than Rate 6L service. Finally, RES contracts reviewed by Mr. Stephens did not contain discounts for interruptibility of load similar to the traditional utility interruptible rates. In the single instance in which ComEd was able to identify an RES "interruptible" offering, it was a curtailment program that was different from the traditional type of interruptible rate. (IIEC Ex. 4.0 at 7-8)

Mr. Stephens concludes that:

"RES power supply certainly is not equivalent substitute service, as the many differences between the two services described above illustrate. To determine whether the service is 'reasonably equivalent' requires one to consider many aspects and to use judgment. In use of its judgment, I recommend the Commission consider the information about the state of the retail market today, and in the future, as well as the information provided by IIEC witnesses. In my judgment, RES power supply arrangements as I have described are not reasonably equivalent substitute service." (IIEC Ex. 4.0 at 9)

Addressing ComEd's position that customer switching supports the existence of a reasonably equivalent service or better, Mr. Stephens suggests the fact that customers have switched does not demonstrate the existence of a reasonably equivalent service, stating:

"...one could choose to purchase a brand new luxury car, recognizing the amenities, prestige and long-term viability of the car. Alternatively, one could choose to buy a compact economy car in recognition of its relatively

low capital cost, maneuverability, and high gas mileage. The fact that both are automobiles and one can choose or switch between them does not in any way prove that they are ‘reasonably equivalent’.” (IIEC Ex. 4.0 at 9)

Mr. Stephens went on to conclude that in determining whether a reasonably equivalent substitute service is reasonably available, it is relevant to consider the process a customer must go through to acquire the substitute service. Explaining that if customers could not access a service, even if it were identical to Rate 6L, or if they had to take extraordinary measures to access the service, it could not be considered “reasonably available.” (IIEC Ex. 4.0 at 10-11).

Mr. Stephens compares and contrasts the procedure for obtaining Rate 6L service to the procedures and steps a customer must take to obtain service from an RES, and notes the lack of standardization in rate products offered by suppliers and the procedures and steps customers must take in order to obtain supply. He notes that RES supply offers are relatively short lived. Contracts must be negotiated, unlike Rate 6L service. Therefore, Mr. Stephens concludes, based on his analysis of the differences between Rate 6L service and RES service and the differences in acquiring such services that a reasonably equivalent substitute service is not reasonably available to Rate 6L customers over 3 MW at this time. It is interesting to note that Mr. Stephens is supported in this conclusion by the testimony of ComEd’s own expert, Dr. Landon, who testified in cross-examination that the RES services identified in his testimony are not comparable to Rate 6L. (Landon Tr. 1120-1121).

2. Position of Other Parties

Mr. Stephens’ conclusion is also supported by the testimony of CACC witness Bradley O. Fults (CACC Ex. 1.0 at 11); and DOE Witness Dr. Dale E. Swan (DOE Ex. 1.0 at 7-9). For example, Dr. Swan testifies that:

“I conclude that there is no reasonably equivalent service currently available at a comparable price, and question whether any such reasonably equivalent product will be forthcoming at a comparable price as long as a CTC determination continues under the existing algorithm.” (DOE Ex. 1 at 3)

Staff witness Dr. Haas suggests it is premature to declare Rate 6L competitive for a 3 MW and over customers and that ComEd has not provided “. . . sufficient or conclusive evidence that there are reasonably comparable alternative services at reasonably comparable prices for . . .” all 3 MW and over customers. (Staff Ex. 3.00 at 3) Therefore, not only do parties directly affected by the ComEd Petition present evidence of the lack of a reasonably equivalent service, reasonably available but the Staff of the Commission, which often represents and brings to the Commission’s attention broader public policy concerns, has concluded that ComEd has not demonstrated the existence of such services.

3. ComEd Response

In response to these arguments, ComEd does not attempt to present evidence demonstrating the existence of reasonably equivalent service reasonably available to 3 MW and over customers. Rather it relies upon the mischaracterization of testimony presented by intervenors in this proceeding. ComEd witnesses Mr. Paul Crumrine and Mr. Dennis Kelter claim that other parties “say” that service from RES must be “identical” to Rate 6L. (ComEd Ex. 8 at 5). Mr. Crumrine and Mr. Kelter have mischaracterized parties’ testimony. A review of Mr. Stephens’ testimony on the equivalency of Rate 6L and RES service will demonstrate that Mr. Stephens does not claim that the service “must be identical” in order for the service to be “reasonably equivalent.” (IIEC Ex. 4.0 at 6-8). Indeed, the only time Mr. Stephens uses the word “identical” in the context of his testimony is in reference to his position that even if a service identical to Rate 6L existed, if it was not reasonably available to customers it could not meet the statutory standard.

(IIEC Ex. 4.0 at 10). Clearly it was not Mr. Stephens' position that the services had to be identical.

The fact that Mr. Stephens and other witnesses identified the differences between Rate 6L and available RES service does not permit one to draw the conclusion that these witnesses assumed that a service must be "identical" to Rate 6L service in order to be declared competitive. Other than this attempt to mischaracterize the testimony of Mr. Stephens and other intervenor witnesses ComEd makes no attempt to explain how available RES services are reasonably equivalent to Rate 6L service and reasonably available.³

Finally, a reasonably equivalent service, reasonably available at a comparable price cannot exist in the absence of a competitive market. As will be demonstrated below such a market does not exist in the ComEd service territory at this time.

Aside from undue reliance upon switching statistics to demonstrate the purported existence of reasonably equivalent substitute services as compared to Rate 6L, ComEd relies upon Dr. Landon's testimony, particularly ComEd Exhibit 13, Attachment JHL-2 which purports to describe service offerings by RESs.

The information that supports Dr. Landon's exhibit was acquired by his research staff from websites. Exception checking websites, he made no effort to make an independent investigation or inquiry regarding any of the specifics of any of these service offerings. (Landon Tr. 1092). Dr. Landon did not know whether these services are currently being offered, but supposes they are because they exist on these companies' websites. (Landon Tr. 1093). Most revealing, Dr. Landon admits he does not know whether

³ ComEd witnesses did attempt to back track from their "mischaracterization." (Crumrine/Kelter Tr. 564-566).

any of these service offerings are available to customers 3 MW or more. (Landon Tr. 1093).

Of the six suppliers Dr. Landon has identified, one of them is ComEd's affiliate, ExGen Energy Corporation. With regard to SEMPRA Energy Solutions, Dr. Landon did not know whether this company was offering the services identified in Illinois. (Landon Tr. 1097). In addition, the one line in Dr. Landon's rebuttal testimony where he suggests that the Guaranteed Energy Savings program offered by AES NewEnergy was comparable to Rate 6L (ComEd Ex. 13 at 20), is refuted by the fact New Energy no longer offers a product which ensures customers 3 MW and over against rises in CTCs. (O'Connor Tr. 380).

There is no evidence in the record that these service offerings identified by Dr. Landon assuming they are available to 3 MW and above customers, are comparable to Rate 6L. Once more, ComEd has failed to meet its burden of proof in this proceeding as it relates to a demonstration that there are comparable services in the market when considering Rate 6L.

Therefore, as Staff witness Dr. Haas has testified the appropriate action of the Commission under these circumstances is to “. . . simply deny the Company's sought-after declaration that Rate 6L is competitive”. (Staff Ex. 3.00 at 3).

C. Comparable Price

The customers in this proceeding have explained why prices offered by RESs are not comparable to the price of Rate 6L service. ComEd has not proven that they are comparable. Absent such proof ComEd's Petition should be denied.

1. Impact of Existence of Competitive Market

In determining whether a service is available at a comparable price one should determine that the

service or a reasonably equivalent substitute service can be purchased in a competitive market reasonably free of market power. (IIEC Ex. 2.0 at 8). Markets provide price protection to customers which is similar to that provided by the Commission under regulated rates in the absence of market power. In the presence of market power, ComEd's proposal would expose customers to being exploited by monopolistic suppliers. (IIEC Ex. 2.0 at 8). As IIEC witness Chalfant noted, the potential for market power is most often demonstrated by the estimation of Herfindahl-Hirshmann Indexes ("HHI") for the relevant market. (IIEC Ex. 2.0 at 8). These indexes quantify the extent to which the market is concentrated among a few sellers. Mr. Chalfant testified that the HHI is

“... calculated by taking the sum of the squares of the market shares of all sellers. For example, if there were only two sellers and each had equal market shares, the HHI would be 50 (percent) squared plus 50 squared, or 5000, which represents an extremely high level of concentration.” (IIEC Ex. 2.0 at 8).

ComEd has not demonstrated that the market for the service, it provides Rate 6L customers with demands of 3 MW or more, is competitive. It is merely identified the existence of a few competitors but provides no evidence concerning the existence of competition.

As ComEd witness Dr. Landon noted, the government should focus on “protecting competition not competitors.” (ComEd Ex. 13 at 12). The fact that there may be many resellers of a product produced by a monopoly does not provide protection to buyers. As Mr. Chalfant noted:

“This would be equivalent to arguing that because ten different retail outlets sell the only toaster made, a competitive market exists for toasters. It is not true for toasters, nor is it true of electricity.” (IIEC Ex. 2.0 at 10).

It is the competitive market which provides reasonably equivalent substitute services at comparable prices. Absent such a market, by definition, there cannot be services and products available to consumers

to meet energy requirements, as are provided under Rate 6L, at a comparable price. For competitive retail markets to exist retailers should be able to procure wholesale supplies to resell to customers in markets which are characterized by an absence of market power (e.g. not dominated by a few large suppliers). (IIEC Ex. 2.0 at 10).

HHI estimates performed by associates of Dr. Landon in another proceeding suggest that there are serious potential market power problems in the ComEd market. (IIEC Ex. 2.0 at 11). The results of the analysis show relatively high HHIs as described below. (IIEC Ex. 2.0 and 2.2). HHIs between 1,000 and 1,800 are considered “moderately concentrated” and markets with HHI is greater than 1,800 are “highly concentrated.” (IIEC Ex. 2.0 at 12).

The analysis demonstrates that based on total economic capacity the market in which Rate 6L customers 3 MW and over would be buying is characterized as highly concentrated during 88% of the summer and winter hours and 68% of the spring and fall hours. The results for available economic capacity indicate highly concentrated markets during 35% of the summer hours and moderate concentration during 67% of the summer hours and 32% of the hours in the remainder of the year. The HHIs for available economic capacity were close to the 1,800 cutoff during many other hours of the year and at least well into the moderately concentrated category during every hour of the year. Thus, market power could adversely impact the ability of the market to protect customers in the ComEd service territory.

Further, the ownership of approximately two-thirds of the generating capacity in the ComEd service territory is concentrated in two producers. The corresponding HHI would be 2,443 which indicates a highly concentrated market. (IIEC Ex. 2.0 at 13). Even considering the ability of customers to purchase power outside the ComEd service territory, the HHI would still be 1,809, which demonstrates a highly

concentrated market. (IIEC Ex. 2.0 at 13). Finally, 78% of the base load capacity in the ComEd service territory is owned by three entities. This indicates an HHI in excess of 2,700 for base load capacity. (IIEC Ex. 2.0 at 14). This suggests a highly concentrated market in base load capacity.

The release of capacity by ComEd's affiliate ExGen does not change the circumstances described above. The ownership of generation within the ComEd service territory is not altered or modified by the release of that capacity. (IIEC Ex. 2.0 at 14).

The conservative nature of Mr. Chalfant's analysis was underscored by the introduction of BOMA Exhibit 29. The exhibit included information relevant to ExGen's Power Purchase Agreement with ComEd and the total ExGen capacity within the ComEd control area. Upon cross-examination, Mr. Chalfant agreed that including this capacity in his analysis would result in higher HHIs than he had projected. (Chalfant Tr. 964-965).

As Mr. Chalfant was concerned with the high concentration of generation resource ownership in the ComEd service territory, so was Staff witness Dr. Haas. He explained that highly concentrated unregulated markets tend to lead to higher prices and greater inefficiencies than markets where there is less concentration among the participating suppliers. He went on to testify the more concentrated the market, the easier it is for the participants to collude, or to act independently, to manipulate price. (Staff Ex. 3.00 at 25).

Dr. Haas noted that even with the release of 2,600 MW of Midwest Generation's capacity to the market, ExGen and Midwest Generation still dominated the base and intermediate load generation in the ComEd service territory. He explained the existence of this locally highly concentrated market could lead to higher off-peak power prices. Given that the only alternative sources of competition at the base load

level would come from outside the ComEd service territory, and that much of the generation in neighboring states is still dedicated to serving native load according to ComEd witnesses, Dr. Haas was of the opinion these alternative generation sources would not be available to compete in the ComEd service territory. (Staff Ex. 3.0 at 26-27).

Market power is more than a theoretical concept. It is one, but not the only one, of the problems that led to extremely high and volatile electric energy prices in California. (IIEC Ex. 2.0 at 14-15). As IIEC witness Chalfant noted the United States General Accounting Office in its report to Congress on the California situation stated:

“ . . . electricity suppliers exercised market power by raising prices above competitive levels during some periods after the restructured market opened. In particular, we found that in parts of 2000, electricity prices did not follow the usual pattern of rising during the high-demand hours and falling during low-demand hours – rather, the highest prices were not found in the hours of highest demand ” (Restructured Electricity Markets - California Market Enabled Exercise of Market Power - report to congressional requesters dated June, 2000 at 11). (IIEC Ex. 2.0 at 15).

This conclusion is of particular relevance to the ComEd situation where market power shown in the information available was of the same type discussed in the General Accounting Office report. (The California experience demonstrates the potential impact of market power if it is ignored.)

2. Impact of CTC

As IIEC witness Brubaker has noted pricing under many alternative service contracts is significantly more volatile due to CTC exposure inherent within the current delivery service tariffs. (IIEC Ex. 1.0 at 10-11). The CTC has the effect of creating uncertainty for customers electing to purchase supplies from RESs. The presence of the CTC can affect the operation of the market as demonstrated by experience over the

last two years. (IIEC Ex. 1.0 at 10). In 2001, MVI values calculated under the ComEd approved mechanism produced results that were much higher than had been the case historically. Therefore, CTCs diminished significantly, and were eliminated for many customers. Valuation of supply options at that time would have been based on low or zero CTCs. In 2002, new market values were established and CTCs increased dramatically, in some cases by over 2 cents per kilowatt hour. (IIEC Ex. 1.0 at 10-11). As a result customers that previously entered into long term contracts are now faced with a combination of alternative power supply costs and CTCs that are higher than perhaps would have been the case under Rate 6L. (IIEC Ex. 1.0 at 11). In the absence of many options, to retail customers, to hedge the risk of CTC volatility, the price cannot be considered comparable.

Therefore, in the absence of any study or evidence offered by ComEd to demonstrate that the RESs are able to procure wholesale supplies needed to resell to customers in the ComEd service territory in a market that is characterized by the absence of market power, and in the presence of information which demonstrates that market power is likely to be a real problem, one cannot conclude that the market in the ComEd service territory will provide customers with protection. Further, one cannot assume that a reasonably equivalent service is reasonably available at a comparable price. Thus, ComEd has not demonstrated compliance with the requirements of Section 16-113 of the existence of such services at comparable prices to Rate 6L.

As Mr. Crumrine noted “... the customer is in the best position to determine whether there is comparable pricing or not.” (Crumrine/Kelter Tr. 572). No customer in this proceeding has testified there are comparably priced offerings available. Indeed customer testimony has been to the contrary. Therefore, ComEd’s Petition should be denied.

D. Other Providers

ComEd has presented evidence indicating there are five non-affiliated RESs serving 3 MW and over customers in its service territory as of June, 2002, MidAmerican Energy Company; AES New Energy, Inc.; Dynegy Energy Services, Inc.; Peoples Energy Services Corporation; and AES Central Illinois Light Company. (ComEd Ex. 7 at 10; IIEC Ex. 4.0 at 13). Therefore, ComEd reasons it meets the requirements of Section 16-113 which provides, in part, that the service or reasonably equivalent service must be available from one or more providers, other than ComEd or its affiliate. However, there is significant uncertainty and, therefore, serious doubt about the ability of these five RESs to continue to serve these customers. If the Commission were to enter an order granting the Petition under such circumstances, it could then be barred from reconsidering its order and the determination to grant the Petition, even if there were eventually no other providers of the service other than ComEd or its affiliate. This is because under Section 16-103 (e) the Commission is prohibited from requiring the utility to offer a competitive service or any tariff service, except those described in this section. (220 ILCS 5/16-103(e)).

There are at least four uncertainties associated with the ability of these five RESs to continue to serve Rate 6L customers 3 MW and over in the ComEd service territory. First, there is the uncertainty created by the recent Illinois Appellate Court Decision (IIEC Ex. 4.0 at 14) misinterpreting and misapplying Section 16-115(d) (5) of the Act. (220 ILCS 5/16-115(d)(5)). This provision is commonly known as the reciprocity clause. (See Local Union Nos 15, 51 and 702 v. Illinois Commerce Commission 5th Dist. App. Ct. No. 5-01-0416 Slip Opinion June 20, 2002.).

The Illinois Appellate Court for the Fifth District stated that it agreed with the Appellant's interpretation of Section 16-115(d)(5) of the Act (the reciprocity clause). (Slip Opinion at 13). Therefore,

the Court concluded that the Commission must find an applicant for ARES certification must comply with “each condition set forth in Section 16-115(d)(5).” (Slip Opinion at 14).

The court sets out the interpretation placed upon Section 16-115(d)(5) by the Appellant at pages 11 - 12 of its opinion.

“(d) The Commission shall grant the application for Certificate of Service Authority if it (finds) *** :

* * *

(5) That *on the condition that* (1) the applicant, its corporate affiliates(,) or the applicants principal source of electricity (to the extent such source is known at the time of the application) owns or controls facilities, for public use, for the transmission or distribution of electricity to end-users within a defined geographic area to which electric power and energy can be physically and economically delivered by the electric utility or utilities in whose service area or areas the proposed service will be offered, (2) the applicant, its corporate affiliates(,) or principal source of electricity, as the case may be, provides delivery services to the electric utility or utilities in whose service area or areas the proposed service will be offered that are reasonably comparable to those offered by the electric utility, and provided further, that (3) the applicant agrees to certify annually to the Commission that it is continuing to provide such delivery services and that it has not knowingly assisted any person or entity to avoid the requirements of this section***.’ ” (Slip Opinion at 11-12 Explanation in the Original)

Thus the Appellate Court decision could be read to impose at least three (and possibly more) requirements on an applicant for certification as an ARES. The first is that the applicant would have to show that it, its corporate affiliate or its principal source of electricity owned or transmission and distribution facilities for the distribution of electricity to end-users within a defined geographic area to which electric power and energy can be physically and economically delivered by the electric utility or utilities in whose service area or areas the proposed service will be offered. Second, the applicant would have to show that the applicant,

or its affiliate, or its principal source of electricity provides delivery service to the electric utility or utilities in whose service area or areas the proposed service will be offered that are reasonably comparable to those offered by the electric utility. Third, that the applicant agrees to certify that it continues to provide delivery services and has not knowingly assisted any person or entity to avoid the requirements of Section 16-115(d)(5).

Prior to the Appellate Court decision this Commission has never required all applicants for ARES service to demonstrate that it or its affiliate or its principal source of electricity owned transmission and distribution facilities used to serve end use customers within a defined geographic area to which power and energy could be physically and economically delivered by the affected Illinois utility, nor has it previously required that every applicant for ARES service demonstrate that it, its affiliate or its principal source of electricity provided delivery service comparable to that offered by the affected Illinois utility. *See* for example, Peoples Energy Service Corporation, ICC Dkt. 99-0432, 1999 Ill.PUC Lexis 682 (Sept. 14, 1999); Nicor LLC, ICC Dkt. 99-0425 1999 Ill..PUC Lexis 684 (Sept. 17, 1999). Nor has the Commission previously interpreted this section of the Act to require that all previously certified ARES certify annually that they provide delivery services comparable to those offered by Illinois Utilities. Therefore, it is easy to discern that the Fifth District decision creates substantial uncertainty with regard to the status of existing ARES and new applicants for ARES certification.

This uncertainty has also been recognized by Staff witness Dr. Haas. (Staff Ex. 3.00 at 30). He agreed that unless the decision is overturned or clarified it will have a frustrating effect on creation of electric retail markets in Illinois and could eliminate or limit potential competitors in the market. (Haas Tr. 710-711). Therefore, unless the decision is overturned or clarified it could diminish the number of RESs

competing in the ComEd service territory.

The second uncertainty relates to the fact that Illinois utilities have joined different RTOs (IIEC Ex. 4.0 at 15-16). The third uncertainty is associated with the continued financial viability of the RESs and their ability to remain certified under Commission Rules. (IIEC Ex. 4.0 at 3, 14, 16-17). The fourth and final uncertainty is associated with the FERC's SMD. (IIEC Ex. 4.0 at 16). These uncertainties will affect the five RESs serving 3 MW and over customers in the ComEd service territory, as well as other RESs wishing to do so.

MidAmerican Energy Company could be affected by the uncertainty associated with RTO development in Illinois. MidAmerican is a member of the Midwest Independent System Operator (MISO). To the extent it relies on its own generation outside the ComEd area there may be uncertainty associated with retail transactions on the ComEd system, since ComEd indicates it plans to become a part of the PJM RTO.

NewEnergy, now owned by Constellation, will have an affiliate which owns or controls transmission or distribution facilities, Baltimore Gas & Electric. However, the ability of Illinois utilities to physically and economically deliver power and energy to the BG&E service territory is not clear. (IIEC Ex. 4.0 at 18). In addition, NewEnergy, like the other RESs could be adversely affected by the existence of market power in the ComEd service territory.

Dynegy Energy Services, Inc. (DES) also faces uncertainty in its ability to continue serving customers 3 MW and over in the ComEd service territory. DES relied on a guaranty agreement from Dynegy Holdings, Inc. in order to meet the requirements of Section 451.510 of the Illinois Administrative Code governing its certification as an ARES in Illinois. At that time Dynegy Holdings had a credit rating

from Standard & Poors of BBB +. This was sufficient to meet the requirements of Section 451.150. However, the bond rating for Dynegy Holdings and Dynegy, Inc. was recently reduced to B+ by Standard & Poors, below investment grade. This creates substantial uncertainty as to the ability of DES to continue to meet the financial requirements for certification of an ARES. (IIEC Ex. 4.0 at 18-19).

Peoples Energy Services Corporation (Peoples) also faces uncertainty associated with the Appellate Court Decision. This is because Peoples does not own or control, nor is it the affiliate of an entity which owns or controls, transmission and distribution facilities used to serve the public, within a defined geographic area, to which power and energy can be physically and economically delivered by Illinois utilities. (IIEC Ex. 4.0 at 19). Therefore, it does not currently meet the reciprocity requirements associated with the Appellate Court ruling.

AES Central Illinois Light Company (CILCO) also faces uncertainty in that CILCO is being required by Ameren and it has been announced that Ameren Energy Marketing Company (“AEM”) will absorb the CILCO retail marketing business. This means there will be one less RES operating in the ComEd service territory unless AEM elects to take over retail marketing activities of CILCO in that territory. In addition AEM is affiliated with a utility in Missouri which does not offer delivery services equivalent to those offered by ComEd. The uncertainty associated with CILCO is further exacerbated by the fact that it and its new owner are located within the MISO. (IIEC Ex. 4.0 at 20).

The Trend in potential suppliers is not promising. The number of RESs serving 3 MW and over customers has apparently declined since December 31, 2001 from six to five. (Juracek Tr. 841-842). Also, other RESs that are registered in the ComEd service territory but not serving 3 MW and over customers, could also be impacted by the uncertainty associated with the Appellate Court Decision as well

as the other uncertainties identified above. In addition, all RESs could be adversely affected by the market concentration and the proposed FERC SMD. (Market concentration issues are discussed in Section II B above. The impacts of FERC's SMD proposal and RTO issues are discussed in Section II H below.)

Further, there have been no new ARES certified to do business in the State of Illinois since 2001, and there are no applications pending for certification. (Juracek Tr.840; Crumrine/Kelter Tr. 634). Several of the ARES identified by ComEd as certified in Illinois but not yet registered to do business in the ComEd service territory, have been certified for periods ranging from one to two years. (Crumrine/Kelter Tr. 630-634). However, it only takes approximately three months to satisfy the registration requirements in the ComEd service territory. (Crumrine/Kelter Tr. 631). Given this apparent lack of interest, there is serious question as to whether there will be a sufficient number of RESs available to serve 3 MW and over customers on a going forward basis.

E. Loss of Business

IIEC has not addressed this issue. However, it is interesting to note that Section 16-113 of the Act sets out the "loss of business" criteria separate and apart from the criteria relating to the availability of reasonably equivalent service etc. Thus, the General Assembly obviously did not intend that the simple fact that customers "switched" providers, would, by itself, demonstrate that the requirements of Section 16-113 have been met. If the General Assembly had intended that to be the case, the additional criteria regarding the availability of a reasonably equivalent service at a comparable price would not have been necessary.

F. Transmission Capacity

ComEd claims that there are 4,700 MW of simultaneous import capability for its system. (ComEd

Ex. 5 at 15). However, it ignores the fact that a portion of the capacity is not available to support firm imports for RESs in the ComEd service territory. This is because a portion of the capacity is assigned to Transmission Reliability Margin and Capacity Benefit Margin requirements, which consume a portion of the import capability (IIEC Ex. 8 at 9). IIEC witness Dauphinais concluded that under the projected generation capacity additions through 2004 and assuming no transmission capacity additions, and even assuming the availability of all 4,700 MW of import capability, there will not be adequate generation capacity in the ComEd service area to make electric power and energy reasonably available to Rate 6L customers 3 MW and over at a comparable price. He indicated this was so because the generation market concentrations are directly dependent on transmission capacity available to import power. (IIEC Ex. 3.0 at 10). The higher the generation market concentration, the less likely it is that there is sufficient transmission capability.

Staff witness Dr. Haas also expressed concern about the lack of adequate transmission capacity within and into the ComEd service area. (Staff Ex. 3.00 at 27-29). Specifically he identified concerns about internal constraints on the ComEd transmission system which could limit access to power supplies. He also expressed concern about the availability of transmission capacity to reduce heavy concentrations in the base load generation market inside the ComEd service territory.

Under these circumstances the Commission should not conclude there is sufficient transmission capacity available such that service reasonably equivalent to Rate 6L is reasonably available at a comparable price from a provider other than ComEd or a ComEd affiliate. Therefore the ComEd Petition should be denied.

G. Customer Switching

ComEd attempts to prove that Rate 6L should be declared competitive for customers 3 MW and above simply because there has been some amount of switching in its service territory. ComEd witnesses refer to its claim that 31% of the load of Rate 6L customers with loads of 3 MW or more have switched to alternative suppliers. (ComEd Ex. 13 at 22; ComEd Ex. 7 at 11). As argued below, ComEd's reliance upon this switching data is misleading and should not be relied upon by the Commission for a determination that there is a reasonably equivalent substitute service that is reasonably available at a comparable price as compared to Rate 6L. ComEd has provided no direct evaluation, definition or analysis of the nature, prices, terms or conditions of service offered by the non-affiliated suppliers to customers 3 MW or greater. (IIEC Ex. 4.0 at 5). As noted above if simple switching statistics alone were sufficient to demonstrate compliance with Section 16-113, there was no need for the legislature to add criteria relating to the availability of a reasonably equivalent service at a comparable price for the purpose of determining whether a particular utility service was competitive.

Customers 1 MW or more have been entitled to go to direct access since October 1, 1999, approximately three years ago. In this three year span the "market" as it were, has been propped up by either ComEd or its generation affiliate, ExGen for two years during this span. In May 2000 ComEd offered a product to all RESs that enabled them to successfully operate in the context of ComEd's new market value index approach. (IIEC Ex. 2.0 at 5). Most recently, in May 2002, ExGen offered further support to RESs such that these entities were able to purchase wholesale supplies for retail sale under favorable terms. (IIEC Ex. 2.0 at 5). In this regard, ExGen used what is referred to in the record as the Market Development Agreement ("MDA") that was entered into with all the providers of electric power at retail in the ComEd service territory (Staff Ex. 3.00 at 7). **CONFIDENTIAL**

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As further evidence that ExGen's MDA is propping up the RESs, in its petition filed with the Commission in Docket 02-0364 where ComEd sought to change its Rider PPO, ComEd stated that several RES were intending to switch over their existing customer load to Rider PPO and that without the anticipated availability of ExGen's offering, these customers would have in fact switched over to the PPO. Mr. Dauphinais concluded that retail choice within ComEd's service territory is currently driven by the MDA. (IIEC Ex. 3.0 at 6).

Even ComEd's own evidence demonstrates the influence these artificial inducements have had in the retail market. ComEd witnesses Crumrine and Kelter sponsored an exhibit that demonstrates the Rate RCDS enrollments through July 12, 2002. (ComEd Ex. 7; Attachment PRC/DFK-7). The chart demonstrates that in May, 2000 and May, 2002, that RES enrollments showed a marked increase after these events.

Staff witness Dr. Haas described at length the various "ComEd subsidies and assistance" that have benefitted RESs. (Staff Ex. 3.0 P at 8-10). Dr. Haas offers several conclusions consistent with those offered by other intervenor witnesses testimonies in this proceeding. He testified this assistance, ". . .preserved an appearance of continuously available 'competitive' supply options. Had ComEd not intervened to prop up the retailers, the retail market most likely would have shifted back toward monopoly service, with customers switching either to PPO or returning to bundled services like Rate 6L." (Staff Ex. 3.0 at 10). He concludes that ExGen's provision of these subsidies is strong evidence that the market in

incapable of sustaining competition. (Staff Ex. 3.0 at 11). Thus, Dr. Haas is apparently of the view that the switching statistics relied upon by ComEd are misleading, insofar as customers have switched not because there are true competitive options in the ComEd service territory, but because there have been artificial inducements and subsidies that are in no way the hallmark of true competition. Hence, ComEd's sole evidence for declaring Rate 6L competitive, switching statistics, is inappropriate because they are artificially inflated due to actions of ComEd's affiliate.

CACC witness Fults was equally suspicious of the so called "market" due to the intervention by ComEd and ExGen. He characterizes the matter as ". . . Edison (is) cutting deals with RESs to provide a 'full requirements' product that was unavailable in the wholesale market . . ." and that the "competitive market was doomed in May 2002 until Edison's affiliate Exelon Generation cut a deal with RESs providing some RESs with wholesale power at a discount... . This covert deal allowed RESs to keep customers from returning to either bundled Rate 6L or Edison's Rider PPO service." (CACC Ex. 1.0 at 9). DOE witness Swan testified similarly, ". . . Exelon's Market Development Program appears to provide to RESs an incentive to lower the price they would otherwise offer to customers. That kind of artificial fillip provides an inflated view of the extent to which large 6L customers are being served by independent, competitive alternative suppliers." (DOE Ex. 1.0 at 12-13).

Not only did IIEC, Staff and some intervenors witnesses dispute the validity of the switching statistics in light of the ComEd/ExGen artificial inducements, but NewEnergy witness Dr. O'Connor also agreed the retail market has required "intervention" by these parties: "As I testified both I believe in direct and rebuttal, we have now several occasions the market has had to rely on intervention by the utility. . . . and I do not know what else to say other than that we have had a couple of occasions now where in order

to address the problems in the MVI we have had to have some sort of form of intervention by the utility.” (P. O’Connor Tr. 354). Dr. O’Connor later testified that absent intervention, there would have been a substantial movement by those eligible customers to move to PPO rather than flowed power. (P. O’Connor Tr. 369). Thus, it becomes more and more clear that the “market” ComEd defends is a market that has struggled in its three years of existence, where assistance and subsidies have been required from the very entity that possesses significant market power as discussed elsewhere in this brief.

To further demonstrate the superficiality of ComEd’s customer switching analysis, consider the existence of Rate HEP in its relation to Rate 6L. During cross-examination, ComEd witnesses Crumrine and Kelter admitted there was but one customer on Rate HEP, which has been in existence since 1998. (Crumrine/Kelter Tr. 622). When faced with the question as to whether Rate HEP was, therefore, comparable to Rate 6L, ComEd witness Crumrine testified that “you cannot directly measure from the switching statistics themselves the equivalency,” but only offered that a very strong inference could be made that the services are reasonably equivalent. (Crumrine/Kelter Tr. 623). Mr. Crumrine agreed that switching statistics do not tell the whole story as they could mean other things as well. (Crumrine/Kelter Tr. 627).

H. Wholesale Market Development

In order for there to be a competitive retail market for electricity, there must be a competitive wholesale market for electricity. “The Commission must verify there is a workably competitive wholesale market for power supplies for RESs before it can conclude there are competitive alternatives available to customers 3 MW or larger that are the same as or reasonably equivalent to Rate 6L and are priced comparably to Rate 6L.” (IIEC Ex. 3.0 at 3). Even so, the immediate future of the wholesale retail market

for electricity is suspect. Significant structural changes involving the transmission systems are hotly debated and the outcome is unknown and will be unknown for some number of years. Moreover, these structural changes are anticipated to bring about new charges and costs, but their amounts and allocations are currently unknown. Given the high degree of uncertainty and ambiguity in the development of the wholesale market structure, it is fair to say that whether the retail market will be able to produce offerings that are reasonably equivalent to Rate 6L is highly questionable.

1. FERC's SMD NOPR Will Have A Direct Bearing On Competition

The Commission knows well that the current structure of the wholesale market is undergoing significant change at this time. The Commission itself has participated in several matters at the FERC, offering comments relating to the development of the wholesale market structure.

Most recently the FERC initiated a proposed rulemaking, Standard Market Design Notice of Proposed Rulemaking (Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, Docket No. RM01-12-000, Notice of Proposed Rulemaking, dated July 31, 2002 (SMO NOPR)). As explained by IIEC witness Dauphinais, FERC intends to transform transmission access from a regime of vertically integrated transmission providers offering transmission service under a physical rights, contract path-based transmission tariff, to a regime of independent transmission providers offering transmission service under a financial rights, actual flow-based transmission tariff.

Mr. Dauphinais explained there are certain provisions presently being considered in the context of the SMD NOPR that could “chill retail competition in ComEd’s service territory.” (IIEC Ex. 3.0 at 11). In this regard, he is specifically referring to Congestion Revenue Rights (CRR) under Locational Marginal

Pricing (LMP), and the proposed resource adequacy requirement. (IIEC Ex. 3.0 at 10). The net result is that these changes could adversely affect competition in the ComEd service area. (IIEC Ex. 1.0 at 3).

a. CRR Charges

LMP is a method of pricing the generation redispatch necessary to provide transmission service when there is insufficient transmission capacity to support the power transactions market participants desire to schedule. The method results in LMP congestion charges. (IIEC Ex. 3.0 at 11).

A CRR is a special type of transmission right that offers its holder a hedge against LMP congestion charges. CRRs are defined between two points (point-to-point CRR) or across a transmission constraint (flowgate CRR). CRRs referred to as “obligation” CRRs are usually defined on a point-to-point basis and entitle their holder to receive a congestion rent or payment from the Independent Transmission Provider (ITP) equal to the difference between the LMPs at the two defined points of the CRR times the magnitude of the CRR. If the extraction point LMP is greater than the ejection point LMP, the holder of the CRR receives a payment from the ITP. Conversely, if the extraction point LMP is less than the injection point LMP, the holder makes a payment to the ITP. If a customer’s schedule matches its obligation of CRR, the customer is always perfectly hedged against congestion charges. However, only customers that are 100% load factor will receive this perfect hedge. (IIEC Ex. 3.0 at 12-13).

Virtually all customers in the ComEd service territory and their RESs are at substantial risk for paying negative congestion rents to the ITP if they hold “obligation” CRRs in the prevailing direction of congestion reverses. (IIEC Ex. 3.0 at 12 - 13). Meaning, where before retail customers and RESs would not be subject to an LMP congestion charge, now these entities will be forced to pay additional charges

to the ITP. These are charges or costs not currently being incurred by those participating in the retail market. Given the nature and extent of these charges, and this new additional dimension of complexity added to retail transactions, can only mean that greater uncertainty will exist.

Mr. Dauphinais added that retail customers or their suppliers might not have sufficient access to CRRs to hedge their electricity purchases from LMP congestion charges. These customers could be held liable for charges for congestion based on spot locational market prices even though they have arranged to hedge their purchase of power to a fixed price bilateral contract. This is especially problematic for retail customers located in geographical areas that cannot be served exclusively from generation located outside of that geographical areas. Such areas on the transmission system are sometimes referred to as load pockets. (IIEC Ex. 3.0 at 14).

Yet to be resolved by the FERC is the manner in which CRRs will be allocated. At this juncture, FERC is proposing to initially allocate CRRs to existing OATT customers taking long-term point-to-point transmission service and network transmission service, and CRRs will also be allocated to public utilities for purpose of delivering power from their designated network resources to serve native load. FERC then plans to have the ITPs auction any CRRs that customers are looking to resell to other customers. Mr. Dauphinais opined, “There is a real possibility that in the SMD final rule, ComEd could be allocated CRRs to serve native load in such a manner that it is difficult for end-use retail access customers or RESs to gain access to these initial allocations that permit RESs to serve such customers with congestion price certainty.” (IIEC Ex. 3.0 at 17).

It is not clear whether retail customers or RESs can acquire the necessary CRRs to provide price certainty for transmission service. If the customers cannot obtain the necessary CRRs, either because they

are unavailable or would have to be purchased at an extremely high price, customers will be at risk of paying spot locational market price differences. (IIEC Ex. 3.0 at 14). Obviously, given that customers will be subject to an additional layer of charges, this almost by definition substantiates that the purchase of retail electric services in the market will be at prices not comparable to Rate 6L.

b. Resource Adequacy Requirement

As part of its SMD NOPR, FERC is proposing that Load Serving Entities (LSEs), including RESs, acquire physical generation capacity (and/or demand response) by ownership or contract, out to a yet to be defined planning horizon, in an amount equal to a load ratio share of future projected load for the ITP, plus a planning reserve equal to no less than 12%. (The FERC is proposing that the generation consist of real and specific generators.) If there is a power shortage, the ITP could charge an additional penalty and, moreover, such entities would be subject to first curtailment during such shortages. (IIEC Ex. 3.0 at 18). Therefore, a contract with a power marketer to deliver power at a future time from unspecified sources would not satisfy the requirement, unlike the current situation under ComEd's tariff, as described below. Forward contracts linked to specific generators could satisfy the requirement. (IIEC Ex. 3.0 at 19).

FERC is also considering other features to the resource adequacy requirement:

- Generation must also be deliverable to satisfy the resource adequacy requirement and, therefore, FERC is proposing to require that CRRs be acquired in advance.
- The demand response should be verifiable to satisfy the resource adequacy requirement.
- There will be determined a planning horizon for each region based on the number of years ahead for which the ITP will have to annually forecast its load and for which the LSE must show it has adequate resources. While traditionally planning horizons have been in the 10 to 20 year range, the newer generating facilities such as gas fired generators have a shorter planning horizon, such as three to five years.

(IIEC Ex. 3.0 at 19-20).

Currently there is no such requirement imposed on RESs in the ComEd service territory regarding resource adequacy requirements. (ComEd Ex. 12 at 7). A RES can enter into liquidated damages power contracts without specific generation designated to supply their retail load. In addition, RESs have the ability to limit their forward purchases of power supplies out to the term of their contracts with retail customers. The ability to use commonly traded liquidated damages products and limit risk in the forward purchases to known future retail sales, has lowered the barriers to entry into the ComEd service territory. (IIEC Ex. 3.0 at 22).

Conversely, FERC's proposed resource adequacy requirement will make it more difficult for RESs to profitably operate in the ComEd service territory. Mr. Dauphinais testified that physical contracts generally require the up-front payment of capacity charges in addition to the payment for energy at market prices. Therefore, RESs will now pay higher prices for the power they purchase to serve retail load. This will, in turn, increase the price of power and energy to retail customers such that the price for power and energy for retail load is further differentiated from Rate 6L charges. (IIEC Ex. 3.0 at 22-23).

The SMD proposed rule would require RESs to potentially have to contract for physical generation supplies 3 to 5 years into the future even if their current retail sales commitments expire well before the end of the planning horizon. Depending on the rule's final outcome, and the manner in which FERC intends to enforce the resource adequacy requirement, RESs may not be able to serve their existing retail commitments without acquiring physical supplies beyond the expiration of the current retail sales commitment. RESs would then take on significant risk associated with holding forward purchased contracts without corresponding future sales. If that is the case, it could very well be that RESs will not participate

in such a market. (IIEC Ex. 3.0 at 22-23).

Further, as IIEC witness Brubaker testified:

“Most of the supply of alternate providers that is indicated as available to serve retail load in the ComEd service area does not qualify for inclusion as ‘capacity’ in the MAIN audit. It shows that the capacity (over 2,100 megawatts out of 2,500 megawatts, or more than 80%) that is allegedly being provided by alternate suppliers is not sufficiently secure to count as rated capacity in MAIN. The FERC SMD proposals, if adopted, could effectively eliminate these suppliers from the market, or require them to make alternate arrangements. It is not known whether or not these suppliers could make such arrangements (and if so, at what cost), and how their ability to compete would be affected.” (IIEC Ex. 1.0 at 8).

Thus there remains a fair amount of uncertainty concerning the impact of the resource adequacy requirement on market development. However the requirement being considered could have a detrimental and adverse impact on retail competition and bears directly upon RESs’ ability to participate in the retail market. This one more reason the Petition to declare 6L competitive should be denied at this time.

2. Impact of RTO Issue

The Illinois legislature properly noted that independent system operators or the functional equivalent are “required to facilitate the development of an open and efficient market place for electric power and energy to the benefit of Illinois customers.” (220 ILCS 5/16-126(a)). However, ComEd ignores the ramifications associated with its decision to join the Pennsylvania - New Jersey - Maryland (PJM) Retail Transmission Organization (RTO). In addition, despite ComEd’s assertion that its commitment to join PJM is unequivocal (*See* ComEd Ex. 6 at 13), the evidence in this docket suggests to the contrary.

ComEd was first a member of the MISO. Approximately two years ago, ComEd withdrew from the MISO and announced its intention to join the proposed Alliance RTO. After the FERC denied the

Alliance Companies RTO status due to scope and configuration problems, and because of the failure to adequately develop and implement an Inter-regional Coordination Agreement with the MISO, ComEd subsequently decided to join PJM through an Independent Transmission Company (ITC) that would also be operated by National Grid Company. (IIEC Ex. 3.0 at 25).

Staff witness Dr. Haas also recognized that the lack of a operating or functioning RTO is an impediment to a retail market. (Staff Ex. 3.00 at 21-24). Dr. Haas testified that “ComEd does not have a reliable track record when it comes to staying in RTOs,” and while ComEd has promised to join PJM, “this promise is not binding.” (Staff Ex. 3.0 at 23-24). Dr. Haas correctly concludes the Commission should not count on a PJM-style market within ComEd’s service territory.

Setting aside ComEd’s commitment or ability to stay with any particular RTO, the evidence in this docket suggests further that its commitment may be wavering. The FERC, in its ruling on July 31, 2002 addressing ComEd’s intention to join PJM through an ITC, did not find the proposed configuration as being just and reasonable. FERC accepted the proposed configuration but subject to the following conditions:

- A functional common market implemented by MISO and PJM by October 1, 2004.
- PJM modify its tariff and agreements to permit participation of ITCs.
- An agreement to form an ITC be filed by National Grid, and other members within 30 days.
- NERC approval of updated reliability plans proposed by MISO and PJM to address reliability issues associated with configuration of the two organizations.
- Concerns about the isolation of parts of Michigan and Wisconsin be addressed.

(IIEC Ex. 3.0 at 26).

At the heart of the issue is whether RTO configuration between MISO and PJM can be made to work. Whether such an RTO configuration will work, depends in large part of a single LMP congestion management system with a single common generation dispatch system. FERC is requiring MISO and PJM to have this system in place by no later than October 1, 2004. (IIEC Ex. 3.0 at 27). Without a single congestion management system, there is serious doubt that the two RTOs will be able to work in tandem.

Mr. Dauphinais, who submitted an affidavit to the FERC in Alliance Companies et al, Docket Nos. EL02-65-003 and EL02-65-005 (IIEC Ex. 3.4) outlining these concerns, stated that transactions internal to one RTO would in some cases flow over the transmission system of the other RTO. This means the actions of PJM will affect the operations of MISO and visa versa.. Because there will be parallel flows on each other's transmission system, there is a substantial risk that the MISO and PJM will be selling the same transmission service twice. This in turn increases the risk of Transmission Loading Relief being sought by both MISO and PJM, which has a direct effect on competitive markets, including the competitive retail market in ComEd's service territory. (IIEC Ex. 3.0 at 27-28).

Even though the FERC has directed MISO and PJM to establish the single congestion management system with a single generation dispatch by October 1, 2004, there is no reason to believe this date will be met. MISO and PJM each have filed separate statements with the FERC indicating their separate and independent opinions that there will not be a functional common market until 2005 at the earliest. Most disturbing, these statements suggest that even by 2005 the functionality will be "across markets," meaning that both entities believe there will be separate markets even in 2005. (IIEC Ex. 3.0 at 29).

Turning again to the issue of ComEd's commitment to join PJM, on August 30, 2002, ComEd and

several other parties filed a request for clarification and application for rehearing with the FERC. (IIEC Cross Ex. 8). Not only did these parties take issue with many of the findings and conclusions by the FERC in its July 31, 2002 order, but also indicated that because of the material differences between what FERC was requesting and what they believed was proper, they may not be able to join the PJM:

“The New PJM Companies fear that they could be ordered, at any point, to terminate their efforts to join PJM if the Commission determines that the conditions relating to creation of a PJM-Midwest ISO common market by October 2004 are unlikely to be satisfied, even if the cause for such non-satisfaction of the order’s condition is due to recalcitrance or failure of parties that are on record opposing the New PJM Companies’ efforts to participate in the RTO of their choice.” (IIEC Cross Ex.8 at 4, *emphasis in original*).

Not only have ComEd and others now placed into question their joining PJM, but in their filing they argue the following:

- FERC should clarify that the new PJM Companies’ ability to join PJM is subject only to their good faith efforts to satisfy the conditions in the July 31 order.
 - FERC should clarify that PJM’s RTO status is not contingent upon the creation of a common market within the Midwest ISO.
 - FERC should clarify that it is not requiring AEP and ComEd to hold Michigan and Wisconsin utilities “harmless” against loop flows not caused by their decision to join PJM.
- (IIEC Cross Ex. 8)

ComEd and the others go on to argue various issues and claims of error involving rate levels, claims that the FERC erred in requiring conditions be imposed in order to assure against adverse operational, and reliability effects and concerns regarding shifting of costs between MISO and PJM. (IIEC Cross Ex. 8).

None of the above bodes well for retail customers in the ComEd service territory. Today, as the Commission considers whether to declare Rate 6L competitive, it is a fact there is not currently an

operating RTO for customers in the ComEd service territory.⁴ It is also a fact there are major disputes and major disagreements involving what the RTO should look like by all involved, including the FERC, this Commission, utilities that are in both MISO and PJM, and customers. It is also a fact that new charges and unknown allocation methods bear upon the shifting of risk between RESs and customers, which only adds to further uncertainty and ambiguity. Consider that Ameren Energy Marketing, Inc., Central Illinois Light Company, and MidAmerican Company, all who are certified RESs in the ComEd service territory, may be bringing in supplies from the MISO transmission system to serve ComEd retail customers. These RESs, and their customers, will face undue complexity and additional charges in dealing with power and energy flowing from one RTO to the other. The end result may very well be that RESs will continue to back away from offering services and products in the ComEd service territory until the playing field is known.

3. Competitiveness of the Wholesale Market in the Future is Doubtful

As part of its analysis and investigation in this proceeding, IIEC examined the concentration of ownership in generation and whether that concentration in conjunction with available transmission capacity will provide for wholesale competition in the ComEd service territory. Based on information provided by ComEd (*See* IIEC Ex. 3.0 at 7), IIEC witness Dauphinais testified the market concentrations in the base load nuclear and base load coal products far exceeded any level that could even remotely be considered able to support workable competition for these products. This is so, because ExGen owns 100% of the base load nuclear capacity and Midwest Gen owns 77%, of the base load Fossil capacity with Dominion owning the remaining 23% capacity. (IIEC Ex. 3.0 at 7-8). As 3 MW and larger customers are

⁴ This is despite the fact that the legislature intended the Illinois utilities to participate in an independent system operator organization, or functional equivalent, by June 30, 1998. (220 ILCS 16-126).

predominantly high load factor customers, it is these customers that would most likely be adversely affected by a lack of workable competition in base load generation products. (IIEC Ex. 3.0 at 8).

IIEC witness Chalfant relied upon the information gathered by Mr. Dauphinais in his market power analysis. Mr. Chalfant also noted that the market for base load capacity is particularly important for high load factor customers, and that the generation ownership indicates an HHI in excess of 2,700 for base load capacity. He concluded there is a very highly concentrated market. (IIEC Ex. 2.0 at 13).

As part justification for its proposal, in the matter of the wholesale market development, ComEd argued there is 4,700 MW of simultaneous import capability for the ComEd system. Even taking into consideration this import capability, it is clear that the resultant levels of concentration are still too high to support workable wholesale competition. (IIEC Ex. 3.0 at 9). The conclusion reached by Mr. Dauphinais is that there will not likely be adequate transmission capacity into the ComEd service territory to make power and energy reasonably available to customers 3 MW or larger at pricing that is comparable to Rate 6L. This is so because generation market concentrations in the ComEd service territory are directly dependent upon the transmission capacity available for the import of power from generation located outside the ComEd service territory. RESs will not be able to offer prices comparable to Rate 6L unless generation market concentrations reflecting transmission capacity are low enough to permit a workably competitive wholesale power market to exist and supply RESs. (IIEC Ex. 3.0 at 9).

Staff witness Dr. Haas was also not convinced that the additional 4,700 MW of simultaneous import capability would benefit the market. He testified a significant portion is not available on a firm basis to supply customers 3 MW and larger outside the ComEd service territory. He concluded therefrom that he cannot foresee how customers are being offered comparable service at comparable prices in a market

that does not currently have the available transfer capacity to allow the provision of this service on a competitive basis to all Rate 6L customers 3 MW and up, at least in the absence of a fully operational PJM style market. (Staff Ex. 3.0 at 29).

The concern that much of the new generation being built in the ComEd service territory was of a peaking nature was observed by Dr. Haas:

“While competition appears to be developing at the peaker level, peakers will most likely continue to represent only a small share of the total kWh of energy consumed. In comparison with baseload plants, peaker plants are generally cheaper to buy, but more expensive to operate, so they typically run during a limited number of hours of the year. While competition among peakers is desirable, as it will help keep the summer peak price lower than it would be in the absence of such competition, the base load generation in ComEd’s territory remains heavily concentrated.”
(ICC Staff Ex. 3.0 at 26).

Dr. Haas is completely correct in stating that the existence of locally highly concentrated markets could lead to higher off-peak power prices.

4. ComEd Response

ComEd had little to say in response to Mr. Dauphinais’ thorough explanation of the SMD NOPR and the potential consequences. ComEd witnesses McNeil and Sterling virtually ignored the entire discussion and only testified that IIEC and the Commission had their opportunity to submit comments to the FERC regarding these matter: “...Mr. Dauphinais is providing comments and posing arguments that are more appropriate for FERC’s SMD NOPR proceedings. FERC is providing interested parties such as IIEC and the ICC, an opportunity to submit comments and raise concerns regarding its NOPR.” (ComEd Ex. 6 at 15). It is more than obvious ComEd is completely ducking these very important issues that bear upon not only the merits of its Petition, but on the viability of the retail electric market itself. ComEd would

have the Commission assume all will be fine when the FERC issues its final rule and ITPs begin its implementation. All may not be fine and there may be unintended adverse consequences on retail competition in Illinois due to “side effects” from the FERC SMD final rule as discussed by Mr. Dauphinais. This is a risk if the Commission enters an Order approving ComEd’s petition and cannot subsequently revisit its decision.

I. Retail Market Development

IIEC addresses this issue in the context of its arguments above and below.

J. Customer/Supplier Reaction

Customer and supplier reaction to the ComEd Petition has not been favorable. No customer or customer group has filed testimony supporting the approval of the ComEd proposal.⁵ No supplier group directly supported the issuance of an order granting ComEd’s Petition.

1. Customer Reaction

From a customer’s point of view the ComEd Petition is highly premature. IIEC witness Mark Kelly testified earlier this summer Caterpillar sent out a request for proposals for contract extensions on RES contracts serving certain facilities in the ComEd service territory. The request went out prior to ComEd’s filing. Analysis conducted by Caterpillar demonstrated that RFP responses offered 6% decreases in the cost of energy supplied, but that such a decrease would be offset by recent CTC increases. The analysis

⁵Trizec Properties, Inc. filed rebuttal testimony in response to the position of NewEnergy witness Dr. O’Connor, which suggested that the ComEd Petition should be allowed to take effect as a matter of law. Trizec opposed Dr. O’Connor’s recommendation unless ComEd first made significant commitments to fixed current issues adversely affecting the competitive supply market for ComEd’s 3 MW and over customers.

demonstrated the total delivered cost of electric energy to Caterpillar's relevant facility was estimated to be \$176,000 more than supply by ComEd under Rate 6L and that annual CTC costs would approximate \$1,300,000. Therefore, Caterpillar concluded, based on the recommendation of its consultant, that Caterpillar should not renew its RES contracts. (IIEC Ex. 5.0 at 4-5). Mr. Kelly noted that from the point of view of large manufacturing companies uncertainty in the planning process needs to be minimized. In price volatile commodities risk management tools are used to mitigate price risk. At the present time it was Mr. Kelly's observation that such tools are not readily available due to the immaturity of the market. He further noted that for an unbundled supply and delivery option to be reasonably equivalent to Rate 6L, there must be methods and tools available to reasonably manage all risk associated with such options. Because such tools are not readily available at this time, he believed that ComEd's proposal to declare 6L competitive was premature. (IIEC Ex. 5.0 at 5)

IIEC witness Gordon Hauk, the Manager of Electric Programs for Ford Motor Company, testified his company is concerned that a competitive alternative to Rate 6L is not available. (IIEC Ex. 6.0 at 3) Like Mr. Kelly, he testified that based on Ford's experience, adequate tools do not yet exist in the market to allow customers to protect themselves from price volatility and supply risk. (IIEC Ex. 6.0 at 4) He noted that full requirements totally fixed price contracts are not available in the market. He suggested this was so because suppliers are unwilling to accept the risk associated with CTCs. (IIEC Ex. 6.0 at 4) Mr. Hauk's opinion in this regard is supported by evidence indicating that suppliers, such as Mid-American Energy, will not offer such products to end use customers because of their inability to protect themselves from volatility of the CTC. (IIEC Cx-Ex. 10) Even AES NewEnergy witness Dr. O'Connor indicated that New Energy basically did not offer such products to 3 MW and over customers. (P. O'Connor Tr. 380.)

Other customers have testified that there is a lack of ability to secure electric power supply from alternative suppliers. DOE witness Swan testified on the federal government's inability to secure electric power supply from an alternative supplier in the ComEd service territory since 1999. (DOE Ex. 1.0 at 13-17). Further, the Metropolitan Water Reclamation District of Greater Chicago (the "District") offered testimony to the effect that ComEd's Petition would harm competition. (District Ex. 1.0 at 5-6). If ComEd's Petition were granted or otherwise allowed to take effect, the District indicated it would not be inclined to test the retail market in the ComEd service territory. (District Ex. 1.0 at 6). Finally, the Chicago Area Customer Coalition through the testimony of its witness Fults testified that services equivalent to Rate 6L are not available in the market and that ComEd's proposal would negatively impact customers. (CACC Ex. 1.0 at 11, 21)

Indeed, there was a general consensus among customers and customer representatives that if the Commission grants the ComEd Petition or allowed the Petition to take effect as a matter of law it would have the opposite effect intended by ComEd. ComEd witness Ms. Juracek has indicated it was ComEd's intention to encourage market development (ComEd Ex. 1.0 at 8). However, customers participating in the retail markets today in the ComEd service territory and those attempting to participate have suggested that ComEd's Petition will have the reverse effect. The Petition, if granted, will encourage customers to return to or remain on Rate 6L. District witness Thomas O'Connor testified the District would be less inclined to go into the market place and shop for electrical services. He makes it rather clear throughout his testimony that the district will stay on Rate 6L service. (District Ex. 1.0 at 7). (*See also* IIEC Ex. 5.0 at 5; IIEC Ex. 6.0 at 3).

Expert witnesses for customers have also offered the opinion that such customers could return to

Rate 6L if ComEd's Petition is approved. IIEC witness Brubaker noted that customers with current RES contracts would have to give consideration to returning to Rate 6L because of the risks and uncertainties in the market. Therefore, ComEd's Petition could have the opposite of its intended effect. (IIEC Ex. 1.0 at 12-13; *See* also DOE Ex. 1.0 at 24). DOE witness Swan testified if ComEd's Petition is granted, "...that the primary response will be wholesale return to Rate 6L bundled service through 2006 by those customers who will have that ability." (DOE Ex. 1.0 at 4). CACC witness Fults also testifies that rather than accept the risk of ComEd's proposal, "...customers instead will remain on or return to Rate 6L for the balance of the transition period." (CACC Ex. 1.0 at 4). This view was supported by Staff witness Dr. Haas who testified that ComEd's plans to leave Rate 6L in place for current 6L customers "...but eliminate the right of delivery service customers to return to Rate 6L, would almost surely have a negative effect on subsequent switching to delivery services." (Staff Ex. 3.00 at 12)

ComEd in support of its Petition, suggests that it believes that customers would not be likely to return to Rate 6L in the face of potential savings associated with unbundled services. (ComEd Ex. 8 at 3). However, the ComEd analysis of the potential savings is not persuasive because similar savings are currently ostensibly available, yet switching is currently low.

In addition, the analysis done by ComEd demonstrates that the existence of Rate 6L does not impede market development, and may encourage market development since, at least in ComEd's opinion, the relevant potential savings from unbundled services are measured against ComEd's above market Rate 6L. ComEd's estimate of the savings achievable by customers choosing a form of unbundled service, in lieu of Rate 6L, do not measure up to the level of savings necessary for 3 MW and over customers to assume the price volatility risk associated with the CTC and other matters. For example, IIEC witness

Hauk testified that Ford Motor Company would require at least a 10% to 20% discount in the multi year contract to choose RES service. (IIEC Ex. 6.0 at 5) However, as noted above, multi year fixed price contracts are not available in the market, let alone with a discount of 10% to 20%.

Therefore, customers have not reacted favorably to the ComEd Petition. They do not believe ComEd has demonstrated that a reasonably equivalent product is available in the market in place of Rate 6L, and that the ComEd Petition will have exactly the opposite of its intended effect in promoting the development of a retail market.

2. Supplier Reaction

MidAmerican Energy, a RES in the ComEd service territory, has taken the position that ComEd has not demonstrated that 3 MW and over customers are being served in a market that can sustain a non-ComEd supply option on a permanent basis. (MidAmerican Ex. 1.0 at 3). MidAmerican states that the assertion that a competitive market exists in the ComEd service territory cannot be supported, unless issues surrounding the MVI and CTCs are resolved. (MidAmerican Ex. 1.0 at 7.) In addition, MidAmerican has made it clear RESs cannot offer a multi year fixed price product because the CTC risk cannot be hedged. (IIEC Cx Ex. 10).

AES NewEnergy, on the other hand, offers conditional support to the ComEd Petition, recommending it be allowed to take effect as a matter of law. It is NewEnergy's hope that ComEd will be frightened into correcting what NewEnergy perceives to be serious defects in the MVEC calculation, because of the possibility the Commission will subsequently determine Rate 6L is not competitive for customers under Section 16-113. However, even this "supporter" is equivocal in its support. First, Dr. O'Connor testified ComEd may not currently meet the requirements of Section 16-113 (P. O'Connor

Tr. 337-338). Upon further questioning by the ALJs he suggested that ComEd may meet the requirements, but it was a very close call, thus damning the ComEd Petition with faint praise. (P. O'Connor Tr. 347-348).

In sum, even in the supplier community, support for the ComEd proposal, without serious steps to correct existing flaws in the market value/CTC situation is essentially non-existent and, in the case at least of one supplier in particular, based upon wishful thinking. Given the customer and supplier reaction to the ComEd proposal, ComEd's Petition should simply be denied. Denial would permit ComEd to refile a petition again in not less than six months based on a more mature market.

K. Other

Customers are subject to harm under the ComEd proposal. ComEd proposes that Rate HEP become the bundled service option for customers who are no longer eligible for service under Rate 6L. While the potential use of Rate HEP as a default rate is not at issue at this time, in the context of the overall ComEd proposal, customers that are knowingly or unwittingly moved from Rate 6L to Rate HEP will be harmed. IIEC witness Stephens documented at length the problems of Rate HEP that contribute to its dismal failure to attract customers in the four years of its existence. Having absolved itself of price risk through the use of hourly energy prices ComEd has also locked in regulated rate-based revenues through the monthly access charge present in Rate HEP. Thus, customers will be required to pay market plus for assets ComEd may no longer own. (IIEC Ex. 4.0 at 23-24).

Another harm to customers is related to the ComEd proposal that only Rate 6L customers on Rate 6L as of June, 2003 billing period will be allowed to retain the right to Rate 6L service for three subsequent years. Customers contractually bound to ComEd or RES for periods beyond June 2003 would be

precluded from ever taking Rate 6L service again. The ComEd proposal treats these customers unfairly because these contracts may have been entered into well in advance of the ComEd filing in this case and, therefore, customers had no opportunity to elect to remain on Rate 6L service in the face of the company filing. (IIEC Ex. 4.0 at 26).

Lastly PPO customers on the ComEd system are also placed at risk. This option has been a favorable one for many ComEd customers. ComEd proposes to limit the PPO tariff and make the service otherwise unattractive to customers. (ComEd Ex. 10 at 12). PPO customers whose contracts expire after June 2003 and who are unable or unwilling to take PPO service because of actions subsequently taken by ComEd to make the rate unattractive to customers will have been effectively deprived of the right to return to Rate 6L service under the ComEd proposal. Customers could be placed in the same position by normal operation of the PPO tariff if their CTC goes to zero. Because of the harm to customers, the Commission should carefully review the evidence in this proceeding to determine whether ComEd meets the requirements of Section 16-113 for declaring a service competitive and deny the ComEd Petition. (IIEC Ex. 4 at 27).

III. Proposed Amendments to Rate 6L

IIEC sees the issues identified below as issues which need only be addressed if ComEd's Petition is granted or otherwise allowed to take effect. The Petition should not be granted on the basis of the resolution of any issue discussed below.

A. New Customers

IIEC supports the Staff's position on this issue.

B. Extension of Transition Period for Customers on Rate 6L

IIEC supports the Staff's position on this issue.

C. Extension of Return Option for Customers Not on Rate 6L

IIEC witness Kelly has recommended that customers currently on long term contracts be given the option to return to Rate 6L after 2003. (IIEC Ex. 5.0 at 6). Staff witness Dr. Haas has also suggested that if the Commission disregards his recommendation to simply deny ComEd's Petition, then customers on special contracts, PPO service, or RES service should be given the opportunity to return to Rate 6L. (Staff Ex. 3.0 at 3). Under Dr. Haas' proposal, as IIEC understands it, Rate 6L would remain available for the foreseeable future to 3 MW and over customers who have not voluntarily abandoned their option to return to Rate 6L, thereby allowing customers to "self select" their status in relation to the competitive market. Dr. Haas notes it is ComEd's position that these 3 MW and over customers are "...sophisticated, rational customers with significant energy market expertise . . ." (Staff Ex. 3.0 at 35). Under Dr. Haas' approach customers electing to leave Rate 6L and not return would constitute a "identifiable customer segment" with unregulated alternatives. (Staff Ex. 3.00 at 35). While these changes are important if the ComEd Petition is allowed to take effect, making such changes does not validate the ComEd Petition to declare Rate 6L competitive.

D. Eligibility Criteria

IIEC did not address this issue, but reserves the right to respond to other parties on this issue.

IV. Accounting issues

IIEC did not address these issues.

A. Accounting Treatment of Revenues and Expenses

- 1. During 3-Year Mandatory Period for Tariffed Service**
- 2. After 3-Year Mandatory Period**

B. Ratemaking Treatment of Revenues and Cost Under Rate 6L Pursuant to Section 16-111(d).

V. Other

VI. Conclusion

The ComEd Petition is premature from the point of view of customers affected by the Petition. Customers are in the best position to determine whether there is a service reasonably equivalent to Rate 6L, reasonably available at a comparable price. Customers in this proceeding have been uniform in their position that such services are not available at this time due to the immaturity of the electric markets in the ComEd service territory, the inability of suppliers to offer long-term fixed price contracts and the uncertainty surrounding the continued presence of existing suppliers, and the barriers to market entry for new suppliers. ComEd's case is built almost exclusively upon the inference that switching statistics demonstrate the presence of a reasonably equivalent service, reasonably available at a comparable price. For the reasons stated in this brief ComEd's inference is not justified. Therefore, ComEd's Petition should be denied.

Denial of the Petition does not prejudice ComEd. It is free to file again in six months. Granting that the Petition under the current circumstances clearly prejudices the interest of customers because the Commission maybe prevented from revisiting the issue if the Petition is granted. Under such circumstances customers should be given the benefit of any doubt, because it is the customers who are ultimately at risk under the ComEd proposal. Giving the customers the benefit of the doubt in this case means that ComEd's Petition should be denied.

Finally, ComEd's Petition is not really an attempt to determine whether a particular service is

competitive. It is but one incremental step in ComEd's attempt to relieve itself and its generating company affiliate of provider of last resort responsibility. The Petition is really a request to "abandon" a service, not a request to declare a service competitive. Therefore ComEd's Petition should be denied.

DATED this 24th day of September, 2002.

Respectfully submitted,
Abbott Laboratories, et al as the
Illinois Industrial Energy Consumers

BY: _____

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38436

PROOF OF SERVICE

STATE OF ILLINOIS :
 :
COUNTY OF MADISON :

SS

I, Eric Robertson, being an attorney admitted to practice in the State of Illinois and one of the attorneys for Illinois Industrial Energy Consumers herewith certify that I did on the 24th day of September, 2002, electronically file with the Illinois Commerce Commission the Brief, filed on behalf of Abbott Laboratories, Inc., et al. as the Illinois Industrial Energy Consumers, and served upon the persons identified on the attached service list, by electronically transmitting same this date.

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SUBSCRIBED AND SWORN to me, a Notary Public, on this 24th day of September, 2002.

Notary Public

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition for declaration of service currently	:	
provided under Rate 6L to 3 MW and greater	:	No. 02-0479
customers as a competitive service pursuant to	:	
Section 16-113 of the Public Utilities Act and	:	
approval of related tariff amendments.	:	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on this 24th day of September, 2002, we have electronically filed with the Illinois Commerce Commission, 527 East Capitol Ave., Springfield, Illinois, 62794, the Brief filed on behalf of Abbott Laboratories, Inc., et al. as the Illinois Industrial Energy Consumers, along with Proof of Service thereon attached.

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COMMONWEALTH EDISON COMPANY
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